IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1670

In the Matters of

BRUCE MICHAEL LEVY, CLAUDIA MANN, BRUCE VANDER MALLE,
Handicapped Children.

JOSEPH W. LEVY, HERBERT MANN, HAROLD A. VANDER MALLE,
Appellants,

—against—

CITY OF NEW YORK, *et al.*,
Appellees.

APPEAL FROM THE STATE OF NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

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INDEX

TABLE OF AUTHORITIES

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JURISDICTIONAL STATEMENT

The Appellants appeal from an Order of the State of New York Court of Appeals entered on February 17, 1976 affirming four Orders of the Family Court of the State of New York and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The Opinion of the State of New York Court of Appeals is reported in 38 N.Y.2d 653 (App. A, 1a). The opinion of the Family Court of the State of New York, Queens County, *In the Matter of Levy* is reported in 78 Misc.2d 394 (*sub nom. In the Matter of Brian M. Logel*) (App. B, 7a). No opinions were written in the three other Family Court Proceedings. A copy of the Order of the Family Court, New York County, dated November 29, 1974, *In the Matter of Mann* (Docket #H 1921-74) is attached (App. C, 14a). The Orders issued, and the findings of the Family Courts in the other three cases are substantially identical. Only the names and the amounts of money differ.

Jurisdiction

The only reason Appellants initiated these Proceedings pursuant to the New York State Family Court Act (hereinafter F.C.A.) §§232(a)(1), 234, is because the City of New York denied their handicapped children a free public education. The City concedes it did not provide a suitable educational facility. Appellants petitioned to compel the City to pay the educational costs they incurred in substituting suitable private educational facilities for their handicapped children. The Family Court, New York County, entered Orders in two of the Proceedings on November 29, 1974. The Family Court, Queens County, entered Orders in the other two Proceedings on December 3, 1974. A notice of direct appeal to the State of New York Court of Appeals on constitutional grounds was filed in the Family Courts on December 24, 1974.

On March 21, 1975, the New York State Court of Appeals consolidated the four proceedings (Motion No. 173). The New York State Court of Appeals Order was entered on February 17, 1976. A Notice of Appeal to this Court was filed in the New York State Court of Appeals and in the respective Family Courts on or about April 28, 1976.

Jurisdiction is conferred on this Court to review the Order by 28 U.S.C. 1257(2). *King* v. *City Council of Augusta,* 277 U.S. 100 (1928). *Staub* v. *City of Baxley,* 355 U.S. 313 (1958); *Poulos* v. *State of New Hampshire,* 345 U.S. 395 (1953) Reh. Den. 345 U.S. 978.

Questions Presented

1. Whether F.C.A. §§232(a)(1), 234, as interpreted and applied, violate the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States because:

   A. They invidiously discriminate in proffering different educational benefits to different classes of handicapped children solely on the basis of the type of handicap rather than the severity of handicap or its effect on learning ability.

   B. They invidiously discriminate against and deprive handicapped children of their protected property interest in a meaningful publicly offered free education.

2. Whether any other Federal right has been denied whether or not capable in itself of being brought to this Court by appeal.

Constitutional Provisions and Statutes Involved

The Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the Constitution of the United States (Amend XIV §1) is set forth in Appendix D.

Article XI §1 of the Constitution of New York State is set forth in Appendix D.

The pertinent provisions of New York State Family Court Act §§232(a)(1), 234 and of New York State Education Law (hereinafter Ed. Law) §§3205(1)(a) [compulsory education]; 4203, 4204(1) 4204(3) [deaf children]; 4206, 4207(1), 4207(4) [blind children]; 4302, 4308, 4352, 4355, 4402(2), 4403, 4404(2)(b), and 4407 are set forth in Appendix E.

Statement

Appellants are all members of a clearly definable class of parents whose handicapped children have been excluded from the Public Schools, because ". . . the City of New York (does not) have an appropriate educational facility." for them. 38 N.Y.2d at 657 (App. A, 2a).

Appellants are also members of another clearly definable class. "Appellants are parents of . . . handicapped children each of whom it is agreed is in need of special residential educational training . . ." 38 N.Y.2d at 657 (App. A, 2a). One Court aptly capsulated special residential educational training as ". . . '24 hour education and socialization programs out of home.'" *Matter of Jetty*, 79 Misc.2d 198, 199 (Fam. Ct., Monroe 1974).

Neither the City nor the State made any effort to place these excluded children in any educational facility.

Appellants' handicapped children were fortunate that their parents were concerned. Eschewing other mundane amenities (e.g., new cars, new color television, etc.) they sought out and enrolled their handicapped children in suitable private residential schools. Then, every year, these parents, already traumatized by the severity of their children's handicapping condition, went into court and faced a full adversary hearing, to prove that they were entitled to the education and to the educational expenses incurred.[1]

> ". . . In each case Family Court granted the parents' application for payment of full tuition as well as of all related transportation expenses. Three orders denied that part of the applications requesting maintenance payment, the court finding the parents of two of the children financially able to pay for board and lodging in full. . . . The fourth order granted the application to the extent of two thirds of maintenance costs, . . ." (38 N.Y.2d at 657; App. A, 2a).[2]

At every stage of these Proceedings, commencing with the hearing before the Family Court, and *In Matter of Mann* and *Matter of Vander Malle* commencing with the Petition itself, Appellants asserted that New York law conferred a right upon their children to a publicly offered, meaningful free education. For their handicapped children a meaningful education meant special residential education. (Appel-

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[1] *Matter of Leitner*, 38 A.D.2d 554, 40 A.D.2d 38, 38-39 (2d Dept. 1971, 1972) (adversary proceeding required); *Matter of Jonathan L. et anno.*, —— N.Y.2d —— (decided April 8, 1976) (parents must annually litigate their children's entitlement).

[2] To avoid semantic difficulty it is essential to emphasize that the term "maintenance" as used herein refers to the child's board and lodging while at the suitable school only. Appellants provide clothing, medical care and all other expense, for the child, including a home.

lants' Brief Point II, Appellants' Reply Brief, Point B.) The Courts held and " . . . it is agreed (that each of Appellants' handicapped children) is in need of special residential educational training . . . " (38 N.Y.2d at 657, App. A, 2a).

At every stage of these Proceedings Appellants argued that (1) requiring them to contribute to any component of the educational costs; (2) excluding their children from public education by failing to provide a suitable educational facility; and (3) " . . . compelling the parents to annually litigate their financial ability or inability to contribute" (Appellants' Brief p. 40) denied their handicapped children an equal educational opportunity. It deprived them and their handicapped children of Equal Protection and denied them Due Process under the Fourteenth Amendment to the United States Constitution.

Appellants also argued that New York State provides a

> " . . . wholly free education, including all maintenance expenses, to children who are either blind or deaf, and that the parents of such handicapped children are not required to make any contribution to the cost of maintenance regardless of their financial ability. (Education Law, arts. 85, 87, 88; §§4204 [deaf children], 4207 [blind children].) The assertion is that this differentiation, operating to the disadvantage of appellants, deprives them of equal protection of the law." 38 N.Y. 2d at 658 (App. A, 3a).

The Family Court disagreed with the Appellants.

> "The Court finds no basis for the conclusion that the provisions of the Family Court Act and the Education Law are violative of the equal protection provisions of the United States Constitution.
>
> " . . . it is likewise found that an order made under section 232 of the Family Court Act which does not provide for board and lodging is a 'suitable order'. Petitioner's arguments to the contrary are rejected." 78 Misc.2d at p. 399 (App. B, 12a).

The New York State Court of Appeals concentrated on Appellants' argument that F.C.A. §§232(a)(1), 234 are repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because they proffer educational benefits to different classes of handicapped children solely on the basis of the type of handicap, rather than on its effect on learning ability. The New York Court rejected the strict scrutiny test urged by Appellants. It found that the classification, though made some one hundred and ten years ago, was rational. Like some archeological artifact it carried " . . . the imprimatur of historical authenticity," 38 N.Y.2d at 659 (App. A, 4a).

The New York State Court of Appeals did not deal with Appellants other constitutional objections. On oral argument Appellants directed attention to *Goss* v. *Lopez,* 419 U.S. 565 (1975) (not cited in their briefs) and pressed their Due Process claim. There are no factual issues.

The Court's decision is in favor of the statutes validity.

The Federal Questions Are Substantial

This Appeal presents substantial Federal questions under the Equal Protection and the Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

Though this is not a class action, the results are a precedent, which directly affect the public educational services proffered to, and the public educational practices applied

to, all handicapped children and also affects their families and the communities in which they live. Perhaps most important is the fact that the only reason this Appeal is here is because the City and State of New York excluded Appellants' handicapped children from the public education system by not providing a suitable educational facility.

The substantiality of the arguments; the sheer number of persons affected; and the undeniable importance of education, particularly to a handicapped child, make this a most appropriate case for plenary review.

A. *Number of Persons Affected*

In enacting P.L. 94-142 (Nov. 29, 1975), the "Education for All Handicapped Children Act of 1975," the United States Congress found that there are more than eight million handicapped children in the United States whose special educational needs are not being met. More than half of them do not receive a meaningful education. One million are excluded entirely from the public school system. And,

> "(9) it is in the national interest . . . to provide programs to meet the educational needs of handicapped children in order to assure *equal protection of the law.*" P.L. 94-142 Sec. 3(b) (emphasis supplied)

In New York State the number of petitions pursuant to F.C.A. §§232(a)(1), 234 has risen from 21 in the 1970/71 school year to over 5,000 in the 1974/75 school year. The number of handicapped children excluded from Public Schools and receiving financial aid under Ed. Law §4407 numbered 6,800 in the 1974/75 school year.[3]

[3] 1974-75 Annual Report, Bureau of Special Program Review, New York State Department of Education. Figures on what percentage of these required special residential educational training were not made available at this time.

B. *The Importance of Education to the Handicapped*

"In *Brown* v. *Board of Education,* 347 U.S. 483 (1954), a unanimous Court recognized that 'education is perhaps the most important function of state and local governments.' *Id.,* at 493. What was said there in the context of racial discrimination has lost none of its vitality with the passage of time:

> 'Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.' *Ibid.*

"This theme, expressing an abiding respect for the vital roll of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided. *Wisconsin* v. *Yoder,* 406 U.S. 205, 213 (Burger, C.J.), 237, 238-239 (White, J.), (1972); *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 230 (1963) (Brennan, J.); *McCollum* v. *Board of Education,* 333 U.S. 203, 212 (1948) (Frankfurter, J.); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923); *Interstate Consolidated Street R. Co.* v. *Massachusetts,* 207 U.S. 79 (1907)." (*San Antonio* v. *Rodriguez,* 411 U.S. at 29-30.)

All the reasons for public education apply with even more intensity to handicapped (exceptional) children.

> ". . . children whose needs are less well understood by parents or more difficult to meet than those of the normal child, whose risks of future dependency are greater, whose ability to profit from unstructured experiences is diminished, whose rejection by thoughtless peers is more frequent, whose self-image is more vulnerable." (Dr. Elizabeth Boggs, Affidavit dtd. August 24, 1973 in *MARC, infra* at p. 14)

For the handicapped child, education is probably the only instrument for helping him 1) to ". . . adjust normally to his environment"; 2) to avoid consignment to a lifetime of dehumanizing costly custodial care; and 3) to avoid Plato's injunction that the handicapped be ". . . put away in some mysterious unknown place." *Meyer* v. *Nebraska*, 262 U.S. 390, 402 (1923).

> "The exceptional child without an education is not merely in jeopardy 'of success,' as the Supreme Court put it, but liberty and life itself."[4]

Without a well planned and structured education a handicapped child may never achieve even a minimal amount of development.

> "A child of average intelligence and good emotional stability may be able to generate enough motivation and resources to get along for a while without a regular schooling program, drawing positive, learning opportunities from the environment. But the child with behavioral or emotional disturbances typically lacks such inner resources and needs very much the guiding hand of a skilled teacher."[5]

[4] Special Education Information Center, Closer Look Newsletter 1 (1972), quoted in Blatt, The Legal Rights of the Mentally Retarded, 23 *Syracuse L. Rev.* 991, 999 n. 23 (1972).

> ". . . The harmful consequence of denying plaintiffs an adequate education is underscored by the fact that mentally retarded children have greater need for formal education since they are less likely than ordinary children to learn and to develop informally." (*Fialkowski* v. *Shapp*, 405 F. Supp. 946, 959 (1975)).

See also: D. McIntyre and F. Lindeman, "The Mentally Disabled and the Law" 111, 268 (1961).

On Plenary review these and other legal, psychiatric, sociological, and educational sources will be fully briefed. Appellants now turn to their legal argument.

I.

F.C.A. §§232(a)(1), 234, violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States because as interpreted and applied they invidiously discriminate in proffering different educational benefits to different classes of handicapped children solely on the basis of the type of handicap rather than the severity of handicap or its effect on learning ability.

A. *The Protectible Property Interest in Publicly Offered Free Educational Benefits*

New York State has undertaken to provide all its children an opportunity of an education.

> "There can be no doubt that a handicapped child has a right to a free education in the State of New

[5] Mills Case File (see *infra* p. 14), Affidavit of Dr. Gunnar Dybwad, Heller School, Brandeis Univ. (paragraph 9).

York. (NY Const, art XI, § 1; Education Law, § 3202, subd 1; *Matter of Wiltwyck School for Boys* v. *Hill,* 11 NY 2d 182.) The handicapped child is further assured such free specialized educational training as may be required. (Education Law, § 4403; Family Ct Act, § 231 *et seq.*)" (38 N.Y.2d at 657-658, App. A, 2a-3a.)

New York State also requires that " . . . each minor from six to sixteen . . . attend upon full-time instruction." Ed. Law, §3205(1)(a).

Having done this New York State has conferred a protectible property interest in an opportunity for a meaningful free public education upon all its handicapped children. *Goss* v. *Lopez,* 419 U.S. 565, 572-576 (1975); *Paul* v. *Davis,* —— U.S. ——, 44 Law Week 4337, 4342, 4349, n.15 (1976). It must make this opportunity available to all handicapped children on equal terms. *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954).

B. *The Classification of Handicapped Children on the Basis of Type of Handicap*

New York State offers blind and deaf children wholly free special residential educational training. It does not offer wholly free special residential educational training to children with other handicaps even though they need it. Thus, for the purpose of proffering a wholly free special residential education, New York has created two classes of handicapped children distinguished solely by the type of handicap with which they are afflicted, which may or may not bear any relationship to the severity of the handicap or to its effect on learning ability. For example, multiple handicaps are undeniably more severe than a single handicap. Nevertheless, where an individual is deaf

and brain-injured at the same time or deaf and retarded State schools for the deaf will not enroll the child.

C. *The New York State Court of Appeals Opinion*

The New York State Court of Appeals says this suspect classification made in 1865, more than one hundred and ten years ago, is rational because it carries " . . . the imprimatur of historical authenticity". 38 N.Y.2d at 659 (App. A, 4a).

The New York Court reasoned that 110 years ago, the legislature may well have judged that blind and deaf children were more educable in general than were those with other handicaps (id. p. 660, App. A, 5a). Such determinations must not be wholly ignored, even though they may not be justifiable, " . . . ab initio, when measured by today's criteria and standards" (id. at 660, App. A, 5a). How can one determine whether a classification made more than 110 years ago is " . . . irrational by knowledge subsequently acquired" (id. at 359, App. A, 4a) unless one measures them against today's criteria? In *Brown* v. *Board of Education,* 347 U.S. 483, 492-493, this Court facing a similar classification said:

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."

Without now enmeshing this Court in the semantics of "more educable," it should suffice to note that many Courts

found no rational basis for a classification distinguishing between retarded children and normal (non-handicapped) children, for the purpose of offering public educational benefits. See: *Pennsylvania Association for Retarded Children* v. *Pennsylvania* (hereinafter referred to as *PARC*), 343 F. Supp. 279, 283 n.8 (E.D. Pa. 1972); *Mills* v. *Board of Education,* 348 F. Supp. 866 (D.D.C. 1972); *Lebank* v. *Spears,* 60 F.R.D. 135 (E.D. La. 1973); and *Maryland Assoc. for Retarded Children* v. *State of Maryland* (hereinafter referred to as MARC) Not Off. Rep., Equity No. 100/182/77676 (Cir. Court, Baltimore County, April 9, 1974).

In PARC the three judge panel said (343 F. Supp. at 296) (footnotes omitted):

> "Our jurisdiction over plaintiffs' equal protection claims also stands on firm ground. Without exception, expert opinion indicates that:
>
> '[A]ll mentally retarded persons are capable of benefitting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency and the remaining few, with such education and training are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education.' "

A fortiori, if there is no rational basis for distinguishing between handicapped children and normal children, can there be a rational basis for distinguishing between chil-

dren with one type of handicap and children with another type?

Without being impertinent, it is sophistry to suggest that a classification, made more than 110 years ago is rational because

> " . . . the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" (38 N.Y.2d at 661, App. A, 6a).

Finally, the New York Court justifies the discrimination against an already deprived class on the basis of the State's limited resources. Many Courts rejected this argument. See *PARC, supra; LeBanks* v. *Spears, supra; MARC, supra; Mills* v. *Bd. of Education, supra; Wyatt* v. *Stickney,* 344 F. Supp. 387 (M.D. Ala. 1972); *Hosier* v. *Evans,* 314 F. Supp. 316, 320-321 (D.V.I. 1973); and *Holt* v. *Sarver,* 309 F. Supp. 362, 385 (E.D. Ark. 1970) aff'd 442 F.2d 304 (8th Cir. 1971). In the *Mills* case Judge Waddy said (348 F. Supp. at 876):

> " . . . If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child."

Similarly in *Wyatt* the Court threatened to curtail state expenditures for highways, etc. unless the state provided more funds from some source, 344 F. Supp. at 397.

D. *Is There a Suspect or Semi-Suspect Classification?*[6]

It is submitted that a classification that differentiates in offering an opportunity for a public education (1) solely on the basis of the type of handicap or (2) on the distinction between handicapped and non-handicapped, unrelated to its effect on learning ability, is *per se* irrational. It is suspect or certainly perilously close to suspect. It is not means-focused. And, in view of the undeniable importance of education, a court should " . . . assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture."[7] In short the classification should be subjected to strict scrutiny. New York should be required to

> " . . . demonstrate that its educational system has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objective . . . " (*San Antonio* v. *Rodriguez,* 411 U.S. 1, 17).

See: *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967); *McLaughlin* v. *Florida,* 399 U.S. 184, 192 (1964); *Dunn* v. *Blumstein,* 405 U.S. 330, 343 (1972); *In re Griffiths,* 413 U.S. 717 (1973); *Sugarman* v. *Dougall,* 413 U.S. 634 (1973); *Bullock* v. *Carter,* 405 U.S. 134, 144 (1972).

San Antonio v. *Rodriguez, supra,* supports Appellants' contention that the classification is suspect. In *San Antonio* this Court was faced with a difficult problem of Federalism.

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[6] By semi-suspect Appellants mean suspect for some purposes, but not for others, depending on the purposes which the classification serves.

[7] Gunther, "In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 *Harv. L. Rev.* 1, 21 (1972).

The Appellees in effect mounted

> " . . . a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues" (*id.* at 40).

Also, the Appellees failed to delineate a class which was being discriminated against. But now did this Court hold, because education is not a fundam Federal right that the State may impose any classificat it chooses. States would not be permitted to differenti between blacks and whites, *Brown* v. *Bd. of Ed., supra;* aliens and citizens, *Graham* v. *Richardson,* 403 U.S. 365 (1971); illegitimate and wedlock children, *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972); *New Jersey Welfare Rights Org.* v. *Cahill,* 411 U.S. 619 (1973).

For the purpose of proffering an equal educational opportunity a classification based solely on the type of handicap falls squarely within this Court's definition of a suspect classification as one:

> " . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" (*San Antonio* v. *Rodriguez,* 411 U.S. 1, 28).

Unlike the New York Court, other Courts, would treat classifications based on handicap as suspect. See *Fialkowski* v. *Shapp,* 405 F. Supp. 946, 959 (E.D. Pa. 1975) where the Court buttressed its own conclusion, saying:

> " . . . . *In Interest of G.H.,* 218 N.W. 2d 441 (1974), the Supreme Court of North Dakota accepted the argument that the handicapped should be classified as suspect and distinguished *Rodriguez* on this basis.

'While the Supreme Court of the United States, using the "traditional" equal protection analysis, held that the Texas system of educational financing, which relied largely upon property taxes, was constitutional, we are confident that the same Court would have held that G.H.'s terrible handicaps were just the sort of "immutable characteristics determined solely by the accident of birth" to which the "inherently suspect" classification would be applied, and that depriving her of a meaningful educational opportunity would be just the sort of denial of equal protection which has been held unconstitutional in cases involving discrimination based on race and illegitimacy. 218 N.W. 2d at 446-47:' "

Treating a classification of handicapped children which is not means-focused as suspect or semi-suspect is supported by the gross historical discriminations against the handicapped, their continued social and political vulnerability and their personal blamelessness for their status.

E. *The Criteria for a Suspect Classification Applied to the Handicapped*

The handicapped are a politically impotent "discrete and insular minority" *United States* v. *Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938). They are frequently deprived of the right to vote, either for mental incapacity, physical immobility, institutionalization or, as a result of prior deprivations.[8] They are under represented in the Legislature. They have been subjected to a history of purposeful unequal treatment analogous to the blacks, the aliens, and the illegitimates. They have been the subject of compulsory sterilization laws, euthanasia laws, laws prohibiting mar-

[8] See Blatt, *Public Policy and the Education of Children With Special Needs*, 38 Exceptional Children 537-537 (1972).

riage, laws removing custody of children, exclusionary zoning laws, and denied admittance to public schools. See: *PARC*, 343 F. Supp. at 293-295; *Buck* v. *Bell*, 274 U.S. 200, 207 (1926); Ferster, "Eliminating the Unfit—Is Sterilization the Answer?" 27 *Ohio St. L.J.* 591 (1966); D. McIntyre & F. Lindeman, *The Mentally Disabled and the Law* 198, 199, 219-220 (1961); O'Hara & Sanks "Eugenic Sterilization" 45 *Geo. L.J.* 30 (1956).

Normal persons averse to personal contact with them have isolated them. See: *Beattie* v. *Bd. of Educ.*, 169 Wis. 231, 172 N.W. 153 (1919) where a 13 year old physically handicapped, but mentally normal child was excluded from regular public school classes because his physical condition produced a depressing and nauseating effect upon the teacher and school children.

The New York State Commission on the Quality, Cost, and Financing of Elementary and Secondary Education (The Fleischman Report) issued in 1972 found

" 'Special class students whose afflictions are other than physical in origin are often labeled by their peers as "retards" or "dum-dums." This label is applied to the retarded, the brain-injured, and the speech-impaired alike, as well as to children in classes for the emotionally handicapped, when they are not referred to as "crazies". Even the staff of "regular" teachers and principals tend to look down on these children . . . Many regular class teachers, like others who are not disabled, regard the handicapped with fear and prejudice'." [9]

[9] As quoted on p. 9 of Proceedings of the Special Study Institute Fostering Positive Attitudes Toward the Handicapped in School Settings sponsored by the Division of Handicapped Children of New York State Education Department, May 1-3, 1975, Rensselaerville, N.Y.

See also: L. Littman "Attitudes Toward The Handicapped" 88-91 (1972).

The handicapped are frequently institutionalized, involuntarily, under the most dehumanizing conditions. *Wyatt* v. *Stickney,* 344 F. Supp. 387, 393 (M.D. Ala. 1972); *New York State Association for Retarded Children* v. *Rockefeller* (later *Carey*), 357 F. Supp. 752, 393 F. Supp. 715 (E.D.N.Y. 1973, 1975).

They are victimized by discriminatory, ill fitting legislation. See: *A Continuing Summary of Pending and Completed Litigation Regarding the Education of Handicapped Children,* Council for Exceptional Children, 1920 Associative Drive, Reston, Virginia 22091.

What this Court said in *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175-176, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972) regarding debarring illegitimate children from certain rights of legitimate children, applies with equal force to debarring handicapped children from the public educational rights proffered to non-handicapped children, or proffered to children with one type of handicap and denied to children with another type.

> " . . . imposing disabilities on the illegitimate (handicapped) child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate (handicapped) child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise." (Footnotes omitted.)

The United States Congress recognized this pattern of pervasive discrimination against the handicapped. In §504 of P.L. 93-112, "The Rehabilitation Act of 1973" (29 U.S.C. §794) it provided that

> "No otherwise qualified handicapped individual in the United States, as defined in Section 706(c) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

This section was intended to serve the same purpose as would have been served by the inclusion of handicapped persons in the Civil Rights Act of 1964. (See testimony. Representative Vanik of Ohio. Congressional Record Vol. 120, May 21, 1974, H. 4212-4213.) See also P.L. 93-380 (28 U.S.C. 821) and P.L. 94-142, particularly Sec. 3(b). New York state receives substantial moneys from the Federal Government under P.L. 93-380 (The Education of the Handicapped Act) and will receive more when it is supplanted by P.L. 94-142.

F. *New York's Legislative Objective With Respect to Education*

Commissioner of Education Ewald Nyquist said that New York's objective is to supply

> " . . . a program of educational services that will provide full educational opportunity for every handicapped child." [10]

[10] *Education of Children With Handicapping Conditions,* a statement by Ewald B. Nyquist,, Commissioner of Education, before Assemblyman Leonard P. Stavisky, Oliver Koppel and the Assembly Committee on Education, March 4, 1975. Released by New York State Education Dept.

The Regents of the University of the State of New York in their position paper 20 "The Education of Children with Handicapped Conditions" said at P. 7

> "The ultimate goal is to have children with handicapping conditions become as self-sufficient as their handicap permits . . . Such children require understanding, acceptance, and help from the schools to fit well into society. The State and its subdivisions have an obligation to educate these children so they can learn to cope with their own physical, mental, or emotional disabilities, as well as with the often limited and stereotyped perceptions of others."

Reading the relevant statutes expressing New York State's objectives, e.g. Ed. Law §4352 (deaf children); Ed. Law §4302 (blind children); Ed. Law §4402(2) (other handicapped children), in conjunction with the New York State Commissioner of Education's Decision in *The Matter of Riley Reid* (Dec. #8742—Nov. 26, 1973); and "The Report of the New York State Commission on the Quality, Cost, and Financing of Elementary and Secondary Education" issued in 1972 (Fleischman Report), particularly Chapter Nine, shows that the purported objective with respect to the education of all handicapped children is identical. It is to provide each one with a meaningful education suited to his needs.

There is no relationship between the State's objective and the classification of children based solely on the type of handicap. The Court concedes that the classification will not bear stricter scrutiny than the lax rational basis standard it applied. 38 N.Y.2d at 659 n. 3 (App. A, 4a).

The Appellants urge that in the absence of a compelling interest no one should be allowed to classify children to determine entitlement to free public educational benefits solely on the basis of the type of handicap.

G. *The Classification of Handicapped Children on the Basis of the Type of Educational Training Required*

The second string to Appellant's equal protection claim is that New York State has undertaken the obligation of proffering a meaningful free public education to every child within its jurisdiction. *Goss* v. *Lopez, supra. Lau* v. *Nichols,* 414 U.S. 563, 566 (1974)

> " . . . The handicapped child is further assured such free specialized educational training as may be required" (38 N.Y.2d at 657-658, App. A, 2a-3a).

The Courts found that Appellants' handicapped children required special residential educational training. 38 N.Y.2d at 657 (App. A, 2a). Nevertheless, the Courts held that the City and State need not pay for their meaningful education if the Appellants had adequate economic means. Thus, for purposes of proffering a meaningful free public education New York has subdivided handicapped children, other than the blind and deaf children, into two classes distinguished solely by the type of meaningful educational training they require, i.e., residential training or non-residential training. This classification relates to the nature of the handicap and therefore the mode of instruction. However, it does not bear any relationship to the handicaps' effect on learning ability.

The New York Court avoids the issue by parsing education into component parts and assigning responsibility for different parts to different people. There is no legislative authority for this. The Statutes do not parse education.

They unanimously iterate the trinity of education namely, "transportation, tuition and maintenance."

Nothing in educational or psychological theory justifies such parsing. The concept of special education is a pervasive one.

> "[o]ne of the general aims of special education is first to ameliorate the deficit by medicine, training, or whatever means are feasible, and then to compensate for the residual deficit by strengthening other abilities and providing specially adapted materials" (S. Kirk, "Educating Exceptional Children," P. 36 (2d Ed. 1972).

Dr. Herbert Goldstein, who among his other qualifications[11] was the Court appointed special master in *PARC, supra,* recently submitted an affidavit dated March 23, 1976 in *State of New York Department of Mental Hygiene* v. *Robert Dolan* (Civil Court of the City of New York Index No. 791/1974) defining special education for a retarded child.

> "3. Education has been redefined as any purposeful intervention or treatment that has as its objective and results in an enhancement in the individual's behavior, aptitudes and skills. This redefinition was promoted in *Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania.*
>
> "4. In *Maryland Association for Retarded Children* v. *Maryland,* I testified that if a child is receiving medication this is a means to an end of furthering his or her education. In that case, the Court accepted the redefinition of education, as stated above, and it has gained common usage, in the educational field.

[11] Professor and Director of the Curriculum Research and Development Center in Mental Retardation at the Ferkauf Graduate School of Humanities, and Social Life. Yeshiva University, New York, N.Y.

> "5. Items such as food, utensils, toiletries, sheets, towels, etc. are educational materials in the context of special education for children such as Maureen Dolan. They are tools of learning which are used to enhance Maureen's behavior, aptitudes and skills. In addition, physical therapy is no longer considered maintenance or medical treatment, but is considered education."

The New York Court's decision places the State and City in the illogical position of recognizing (1) that for a meaningful education Appellants' children need special residential education (38 N.Y.2d at 657, App. A, 2a); (2) of trumpeting that New York State has assured the handicapped child " . . . such free specialized educational training as may be required (Id. at 658, App. A, 3a); and (3) somehow arguing that you can have free specialized residential educational training for handicapped children who are not blind or deaf without providing maintenance; that you can provide a meaningful education for children who need special residential education without providing maintenance. As the Court in *Fialkowski* v. *Shapp, supra* said at 959

> " . . . An educational program must be assessed in terms of its capacity to equip a child with the tools needed in life. See *Wisconsin* v. *Yoder,* 406 U.S. 205, 222, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)."

H. *Maintenance Has Historically Been Recognized as Part and Parcel of Education in an Appropriate Case*

In making provision for the education of young persons as future officers of the various military services the United States Government and most other governments concluded that the training, living, eating, marching, and socializing

together, the creation of a particular milieu, is an integral element of their education. Their maintenance (board and lodging) at the respective academies is an integral part of their education. Similarly, the milieu is an integral element in the education of these handicapped children who need special residential educational training.

An analogy can also be drawn from hospitalization of patients in need of surgery. One could argue that maintenance (board and lodging) in the hospital is not a medical expense, it is only incidental to the direct cost of drugs, doctors, anaesthesia, etc. But in the words of a once popular song "You can't have one without the other." So it is with Appellants' children. It is impossible to educate these children in one place and maintain them in another.

In *PARC, supra,* the three Judge Court did not discern a distinction between tuition and maintenance. It enjoined the Commonwealth of Pennsylvania (343 F. Supp. at 302)

> "(d) from applying Section 1376 of the School Code of 1949, 24 Purd. Stat. Sec. 13-1376, so as to deny tuition or *tuition and maintenance* to any mentally retarded person except on the same terms as may be applied to other exceptional children, including brain damaged children generally;" (Emphasis supplied.)

See also: *Matter of Kirschner,* 74 Misc.2d 20, 344 N.Y.S. 2d 164 (Fam. Ct., Monroe, 1973); *Mills Case, supra,* etc.

I. *The Money Issue*

The real difficulty, one surmises, is that education of the handicapped is more expensive and the possible educational attainments are more modest.

The cost argument was succinctly answered *In Matter of Downey,* 72 Misc.2d 772, 775 (Fam. Ct., N.Y. Co., 1973) where the Court observed

> " . . . while at first blush this may seem like a substantial outlay of funds for one child, when compared with the dollar cost of maintaining a child in an institution all his life or on public assistance the cost is minimal; not to speak of the incalculable cost to society of losing a potentially productive adult."

The Court in *Downey, supra* also noted at pp. 774-775

> " . . . it is the child who is given the right to an education, not the parent and his right should not be abridged or limited by the willingness of a parent to become financially liable for the education. To limit the right to an education in this manner would discourage many parents from seeking the appropriate facilities for their child."

A recent issue of the New York Times (Sunday, April 25, 1976) had a special Spring survey of education. On Page 21 of that Section there was an article entitled "The Puzzle of Learning Disabilities" (a form of handicap). Included among persons so handicapped were President Woodrow Wilson, Albert Einstein, Thomas Alva Edison, etc. Can one calculate the loss to society if the parents of these people had opted for the new car rather thar the education of the handicapped child and public education had eschewed its responsibility.

The only doctrinally supportable rationale for segregating maintenance from other educational costs is the supposition that the handicapped child's parent obtains a windfall. He is relieved of substantial elements of support which parents of normal children bear. This is demonstrably false

as will be documented in the briefs on plenary review. However, even if it were true, in any aspect, the logical corollary would be calculate and charge the parent for any "net saving" realized by reason of his handicapped child being at a special residential educational facility. This would have nothing to do with using an economic means test to invade the parents' privacy.

II.

F.C.A. §§232(a)(1), 234, violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States because they invidiously discriminate against and deprive handicapped children of their protected property interest in a meaningful publicly proffered free education.

Appellants claim that FCA §§232(a)(1), 234 denies them, and the 5,000 other parents who have to annually petition thereunder, substantive Due Process.

The only reason Appellants had to initiate these proceedings pursuant to F.C.A. §§232(a)(1), 234 is because the City deprived their handicapped children of a free public education. The City failed to provide a suitable educational facility. Being deprived of an education without cause is a denial of substantive Due Process. *Strickland* v. *Inlow,* 485 F.2d 186, 190 (8th Cir. 1973), vacated and remanded on other grounds *Wood* v. *Strickland,* 420 U.S. 308 (1975); *Moore* v. *Board of Trustees,* 344 F. Supp. 682 (D.S.C. 1972); *Cook* v. *Edwards,* 341 F. Supp. 307 (D.N.H., 1972); *Ordway* v. *Hargraves,* 323 F. Supp. 1155, 1158 (D. Mass. 1971).

As a consequence of the City's default, the burden of first finding and then financing their handicapped children

in a suitable private facility was shifted to the Appellants. To compel the City to pay the educational expenses incurred the Appellants had to finance these annual costly full adversary Court proceedings. The burden was shifted to Appellants to prove (even though the City concedes its inability to provide a suitable facility), that (1) their child is handicapped; (2) that the private school is a suitable school, properly administered and not too expensive. (See *Matter of Butcher,* 82 Misc. 666 [Fam. Ct. Queens 1975]); and (3) whether they can afford to contribute. No such burden is imposed on the parents of children who have not been excluded from the Public School system, nor on the parents of the children eligible for enrollment in publicly supported private schools for the blind and the deaf.

Since Appellants have been ordered to contribute to their handicapped childrens' maintenance and since the amount is in excess of any net saving realized by reason of their handicapped children temporary absence from home, they are being deprived of property without Due Process of Law. No such burden is imposed on the parents of children who have not been excluded from the Public School system nor on the parents of handicapped children eligible for enrollment in publicly supported private schools for the blind and the deaf.

Since, under ideal circumstances it takes a period of six to seven months before the private school receives any money as a result of these proceedings this creates a cash flow problem which they were not willing to assume. As a result Appellants had to use income producing funds to pay their handicapped childrens' educational expenses to be reimbursed to the extent and when the school actually received payment. Since Appellants are middle income

people this loss of income is more tolerable than it is on the poor parent. In the latter case the parent finds that the doors to many private schools are closed to him or that he has to borrow monies at an ill afforded interest charge ranging between $300-$1,000 depending on size of educational expense and duration of the delay in payment. No such burden is imposed on the parents of children who have not been excluded from the Public School system nor on the parents of handicapped children eligible for enrollment in publicly supported private schools for the blind and the deaf.

F.C.A. §§232(a)(1), 234 are at best an unfair and inept way of coping with a very real problem, which has serious consequences for the blameless child. There are built in deterrents, all of which operate to the detriment of the child, either in the form of no education or a lesser education. The parent may be deterred by ignorance of the remedy;[12] by the possibility of having to contribute; by the hassle, cost, delay and embarrassment of a full adversary Court proceedings.

Since the United States Congress has found that millions of handicapped children do not receive a meaningful education (P.L. 94-142, Sec. 3[b]), one can only conclude that the deterrents are real and too many parents have heeded Plato's injunction and put their handicapped children ". . . away in some mysterious unknown place."

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[12] The genesis of *In the Matter of Jonathan L.*, —— N.Y. —— (April 8, 1976), was the parent's (a prominant attorney's) ignorance of that remedy.

CONCLUSION

The questions presented by this appeal are substantial, and of public importance. Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the Court of Appeals, State of New York

In the Matter of BRUCE M. LEVY. JOSEPH W. LEVY, Appellant; CITY OF NEW YORK et al., Respondents.

In the Matter of BRUCE M. LEVY. JOSEPH W. LEVY, Appellant; CITY OF NEW YORK et al., Respondents.

In the Matter of CLAUDIA MANN. HERBERT MANN, Appellant; CITY OF NEW YORK et al., Respondents.

In the Matter of BRUCE A. VANDER MALLE. HAROLD A. VANDER MALLE, Appellant; CITY OF NEW YORK et al., Respondents.

Argued January 7, 1976; decided February 17, 1976

JONES, J. We hold that section 234 of the Family Court Act is constitutional notwithstanding that it authorizes Family Court in New York City to direct parents of handicapped children, other than children who are blind or deaf, to contribute to the maintenance of such children in connection with their education.

Appellants are parents of three handicapped children,[1] each of whom it is agreed is in need of special residential educational training and for none of whom does the City of New York have an appropriate educational facility. Each of the three children was attending a suitable private residential school. In each case Family Court granted the parents' applications for payment of full tuition as well as of all related transportation expenses. Three orders denied that part of the applications requesting maintenance payment, the court finding the parents of two of the children financially able to pay for board and lodging in full and accordingly directing them to make such payments. The fourth order granted the application to the extent of two thirds of maintenance costs, directing the parent of the third child to pay the remaining third. Appellants all concede their ability to make the payments ordered. It is their contention that the statute under which they were directed to pay maintenance expenses is unconstitutional. Family Court rejected that contention in each case. The present direct appeals on constitutional grounds ensued (NY Const, art VI, § 3, subd b, par [2]; CPLR 5601, subd [b], par 2) and have been consolidated for our review.

Appellants' challenge to the statute is grounded in contentions that they have been denied equal protection of the law in two aspects. First, and principally, they urge that to require them to contribute to the maintenance component of educational expenses when no such contribution is required of the parents of deaf or blind children works a constitutionally impermissible discrimination. Secondly, they argue that, while the statutes authorize the imposition of such burden on parents of handicapped children in New York City, the same is not true with respect to children who reside outside New York City, and that this circumstance likewise constitutes a denial of equal protection.

There can be no doubt that a handicapped child has a right to a free education in the State of New York. (NY Const, art XI, § 1; Education Law, § 3202, subd 1; *Matter of Wiltwyck School for Boys v Hill,* 11 NY2d 182.) The handicapped child is

1. Two of the four appeals are from separate orders involving the same child, but for different school years.

One child suffers from "organic brain syndrome with secondary autism manifested by moderate mental retardation, hyperactivity and language impairment"; another from "schizophrenic reaction, childhood type"; and the third from "overanxious reaction of childhood with borderline features".

further assured such free specialized educational training as may be required. (Education Law, § 4403; Family Ct Act, § 231 *et seq.)*

Incident to the direct cost of education, i.e., tuition, are the expenses of maintenance and transportation. It is not disputed that under our State's educational program the parents of all handicapped children have no responsibility for either tuition or transportation expense. The controversy here revolves around the imposition on the parents of handicapped children, other than those who are blind or deaf, of the costs of maintenance.

The fulcrum of appellants' argument is the circumstance that in consequence of legislative enactment the State provides wholly free education, including all maintenance expense, to children who are either blind or deaf, and that the parents of such handicapped children are not required to make any contribution to the cost of maintenance regardless of their financial ability. (Education Law, arts 85, 87, 88; §§ 4204 [deaf children], 4207 [blind children].) The assertion is that this differentiation, operating to the disadvantage of appellants, deprives them of equal protection of the law.

At the threshold of consideration of any equal protection claim is the determination of the applicable standard of review. Handicapped children as such do not constitute a "suspect classification" (cf. *Matter of Lalli,* 38 NY2d 77 [illegitimate children]; *Matter of Malpica-Orsini,* 36 NY2d 568 [illegitimate children]; contrast *Loving v Virginia,* 388 US 1 [race]; *Hernandez v Texas,* 347 US 475 [national origin]; *Matter of Griffiths,* 413 US 717 [alienage]). Nor is the right to education such a "fundamental constitutional right" as to be entitled to special constitutional protection *(San Antonio School Dist. v Rodriguez,* 411 US 1, 16). Accordingly, the appropriate standard is not the so-called strict scrutiny test or anything approaching it, but rather the traditional rational basis test. *(Montgomery v Daniels,* 38 NY2d 41, 59; cf. *Matter of Jesmer v Dundon,* 29 NY2d 5, app dsmd 404 US 953.)

A rational basis does exist for the distinction made in relieving the parents of blind and deaf children from any financial responsibility in connection with their children's education while at the same time requiring parents whose children are otherwise handicapped to contribute to the maintenance component of educational expenses.

There can be no doubt that as a matter of history and

tradition our society has accorded special recognition to the blind and to the deaf in the field of education as elsewhere. In New York State since 1865 a school for the blind has been maintained by the State at Batavia (Education Law, art 87) and a school for the deaf at Rome[2] (Education Law, art 88). In addition there are five other schools for the deaf and five other schools for the blind subject "to the visitation of the commissioner of education" who has broad supervisory powers in the operation of such schools (Education Law, § 4201).

In the related field of social services, assistance to the blind has long been recognized as a special category (Social Services Law, art 5, tit 7, prior to repeal and consolidation with other categories by L 1974, ch 1080, § 4). Additionally the New York State Commission for the Blind and Visually Handicapped has a venerable and distinguished history (L 1913, ch 415, as amd; Social Services Law, § 38).

The Federal Government has also long accorded privileges and benefits to the blind which are not available to other handicapped persons—e.g., an additional exemption for income tax purposes (Internal Revenue Code, US Code, tit 26, § 151, subd [d]); disability benefits to the blind under the Social Security Act "without regard to ability to engage in any substantial gainful activity" (US Code, tit 42, § 423; 20 CFR 404.1501 [b]; see *Ferguson v Celebrezze,* 232 F Supp 952, 955–956); free mailing privileges (US Code, tit 39, §§ 3403, 3404).

We think that the Legislature acts rationally when, in the exercise of its authority and responsibility to identify concerns of the State and to make provision with respect thereto, it takes into account distinctions which carry the imprimatur of historical authenticity, provided that such distinctions are not the reflection of invidious discrimination and have not been demonstrated to be irrational by knowledge subsequently acquired.[3] It strikes us as unintelligent to say that the decisions made in the past and the value judgments of those preceding us who were then responsible for identifying the

2. From 1887 to 1963 the New York school for the deaf was privately operated under State supervision.

3. In passing we again observe that here we address classifications as to which the equal protection standard is that of rational basis. In instances of "suspect classifications" and "fundamental constitutional rights", where special constitutional protection is assured by application of the strict scrutiny test, historical practice would not, of course, be accorded any such significance.

priorities of governmental concern and response must be wholly ignored unless the determinations which were then made can be justified, *ab initio,* when measured by today's criteria and standards. This is not to say that we may today complacently accept the wisdom and the unwisdom of the past. It is to say, on the other hand, that the policy judgments and the priority determinations of our history are not totally to be rejected, especially when those judgments and determinations have enjoyed public acceptance for a long period of time. As we have said in another context: "While antiquity is not an infallible criterion for determining the scope of constitutional rights, traditional usage and understanding is helpful in defining the privilege against self incrimination". *(People v Samuel,* 29 NY2d 252, 264.)

Our Legislature in granting the preferences to parents of the blind and deaf may well have judged at the time that children with these handicaps were more educable in general than were those with other handicaps. There may also have been other politically and educationally sound predicates for the choice. The resulting educational programs manifest the historical public recognition, understanding and acceptance of human disabilities. Government, and particularly the legislative branch, acts responsibly when it reflects the concerns and interests of the governed except when to do so would be to trespass on constitutionally protected rights. Obviously choices must and will be made; priorities must and will be set. This is the essence of the legislative process. Were the financial resources available to State government unlimited, this would not be necessary and might not be desirable. It would be unthinkable, however, to suggest that confronted with economic strictures State government is powerless to move forward in the fields of education and social welfare with anything less than totally comprehensive programs. Such a contention would suggest that the only alternative open to the Legislature in the exercise of its policy-making responsibility, if it were to conclude that wholly free education could not be provided for all handicapped children, would be to withdraw the benefits now conferred on blind and deaf children—thus to fall back to an undifferentiated and senseless but categorically neat policy that since all could not be benefited, none would be.

As the Supreme Court of the United States has written in

an associated context: "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner v. Texas,* 310 U. S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler v. Dental Examiners,* 294 U. S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A. F. of L. v. American Sash Co.,* 335 U. S. 538. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *(Williamson v Lee Opt. Co.,* 348 US 483, 489.)

We conclude that there is a rational basis for the differentiation in treatment of the maintenance component of the educational expenses of blind or deaf children and children who are otherwise handicapped. *(Matter of Claire,* 44 AD2d 407, mot for lv to app dsmd 35 NY2d 706.)

As to the other branch of appellants' equal protection arguments, it suffices to note that it is predicated on a false premise. There is no difference in the authority of the courts within and without New York City to direct a parent financially able to do so to contribute to the maintenance component of the expense of education of his handicapped child. Section 234 of the Family Court Act expressly grants the authority within the city. While it is true that no comparable articulation is to be found in present section 232, applicable outside the city, this has been described as a legislative oversight in the 1964 amendment and exercise of a comparable authority outside the city has been upheld as implicit in the power of the court to enter a "suitable order" under sections 232, 413, 414 and 416 of the Family Court Act (cf., also, § 415). *(Matter of Charilyn "N" v County of Broome,* 46 AD2d 65, 66; *Diana L. v State of New York,* 70 Misc 2d 660, 665.)

The orders of Family Court should be affirmed.

Chief Judge BREITEL and Judges JASEN, GABRIELLI, WACHTLER, FUCHSBERG and COOKE concur.

In each case: Order affirmed, without costs.

APPENDIX B

Opinion of the Family Court, Queens County

In the Matter of BRIAN M. LOGEL, an Allegedly Handicapped Child.*

Family Court, Queens County, June 6, 1974.

Schools — handicapped children — parent of handicapped child may constitutionally be required to provide maintenance expenses; extension of maintenance expenses to blind or deaf children, as act of public charity, does not violate equal protection of laws — parent of handicapped child may not be required to contribute to cost of tuition.

1. The parent of a handicapped child may constitutionally be required to provide maintenance expenses for the child while in a residential setting. Although the basic obligation to provide maintenance is generally on the parent, there is no violation of equal protection of the laws in that blind or deaf children are extended full contribution for both tuition and maintenance, since this is an act of public charity and only a clear violation of the Constitution will justify overruling the Legislature.

2. The parent of a handicapped child may not constitutionally be required to contribute to the cost of tuition of a handicapped child, since the basic obligation to provide an education is imposed by the Legislature upon the community.

Sage, Gray, Todd & Sims (*Cheryl J. Bradley* of counsel), for petitioner. *Adrian P. Burke, Corporation Counsel* (*Herbert Stine* of counsel), for City of New York. *Louis J. Lefkowitz, Attorney-General* (*A. Seth Greenwald* of counsel), for State of New York.

SAUL MOSKOFF, J. In this proceeding wherein the petitioner, the parent of a handicapped child, seeks to have the State and city assume the cost of tuition, transportation and maintenance of the child in a residential setting, questions of constitutional impact are raised which require judicial determination.

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* Name fictitious for purposes of publication.

No factual issues are presented since the City of New York did not attempt to controvert the documentation establishing that the child is a handicapped child within the statutory definition and that the public school system of New York is unable to provide an appropriate educational facility for the child.

The petitioner argues that the statutory requirement that a parent, who is found able to do so, must assume the cost of tuition, or contribute to such cost, consistent with his means to do so, is unconstitutional, citing *Matter of Beverly L.* (Family Ct., Kings County, Docket No. H 3913/73), *Matter of Barry F.* (Family Ct., Westchester County, Docket No. H–7–72), *Matter of Downey* (72 Misc 2d 772). Not cited by petitioner but supporting his position is *Matter of Kirschner* (74 Misc 2d 20).

No authoritative determination bearing directly on this constitutional issue by any appellate court may be found. Petitioner, however, points to *Matter of Leitner* (40 A D 2d 38) in support of his contention that a handicapped child has a constitutional right to a free education and that his parent may not be constitutionally required to contribute to the cost of tuition, whether able to do so or not. *Leitner*, however, is not decisive on the issue since the alleged constitutional bar to contribution by the parent was not presented or decided.

This court concurs with the rationale and holdings of *Beverly L., Barry F. Downey* and *Kirschner* (*supra*) and accordingly determines, that a parent of a handicapped child may not constitutionally be required to contribute to the cost of tuition of such child in a private educational setting.

A different question arises as to whether a parent may be required to pay or contribute to the board and lodging (maintenance) of a handicapped child while in a residential setting and whether the constitutional protections against being required to contribute to tuition, as herein determined extend to furnishing basic necessaries for the maintenance of the child.

The petitioner, in a well-prepared and scholarly brief submits the following arguments to support his position.

A. Handicapped children requiring special educational facilities whose handicap is deafness or sightlessness are provided

by statute with facilities for their education and such statutes explicitly require that board and lodging as well as tuition be provided for such children, the cost thereof being imposed on the State without any reference to contribution by the parents.

Petitioner then equates a handcapped child fitting the statutory description under section 232 of the Family Court Act and the sections of the Education Law pertaining thereto with blind and deaf children and argues that to refuse them similar treatment is discriminatory, without any rational basis and is violative of the constitutional privileges of equal protection of law.

B. Since section 232 of the Family Court Act provides that the court make a "suitable" order for a handicapped child's needs for "special educational training", any order which does not provide for board and lodging for the child would not be a "suitable" order.

C. Since the City of New York is required by law to either provide a public education facility for a handicapped child within its school system or in the alternative place the child in a private school in accordance with section 4404 (subd. 2, par. 6) of the Education Law this mandate entitles the child to free maintenance as well as free tuition.

D. There being a constitutional right to free tuition for a handicapped child, there is a concomitant constitutional right to maintenance.

E. Section 234 of the Family Court Act dealing with "Educational service in counties within the city of New York" provides for reimbursement by parents able to do so. Section 232 of the Family Court Act dealing with educational services generally contains no provision for parental reimbursement. Therefore, argues petitioner, section 234 of the Family Court Act is unconstitutionally discriminatory in that it places a greater burden on a parent of a handicapped child residing within the City of New York than that placed on such a parent residing outside the City of New York.

Before discussing petitioner's arguments, it is appropriate to emphasize that our statutes abound with provisions placing the basic and primary obligations on a parent, rather than the community, in supplying the everyday needs of a child. On the other hand, there is imposed upon the community the basic obligation of furnishing a free public education to every child. (N. Y. Const., art. XI, § 1.)

Section 32 of the Domestic Relations Law and sections 413, 414 and 415 of the Family Court Act place the basic and pri-

mary obligation for the support of children under 21 years of age upon the parents of such children.

Section 233 of the Family Court Act provides that when a child is placed with an authorized agency or with a person other than a parent and is retained in accordance with the rules of the State Board of Social Welfare, compensation for his "care and maintenance" shall be a charge upon the welfare authorities. Subdivision (b) of that section authorizes the Family Court to require a parent to contribute in whole or in part, to the "support" of such child.

Section 234 of the Family Court Act titled "Educational service in counties within the city of New York," dealing with the educational requirements of mentally retarded children, authorizes an order for (i) maintenance, (ii) transportation, (iii) education, (iv) tuition, and, except for children with retarded mental development, (v) home teaching or (vi) scholarships. Subdivision (b) of section 234 provides that when an order is made for any of the foregoing services, the court may issue an order directing a parent to pay a part or all of the expense of such service. It will be noted that the statute provides that the court "*may*" not "*shall*" make such an order.

Section 235 of the Family Court Act titled "Compensation and liability for support and care in counties within the city of New York" provides that upon the detention, placement or commitment of a child by the Family Court in a county within the City of New York, the Department of Social Services of the City of New York shall investigate the ability of the parent to contribute in whole or in part to the expense of the maintenance of such child. If the Department of Social Services determines that such a parent is able to contribute in whole or in part, it shall institute a proceeding in the Family Court to compel such payment or contribution.

Nonsupport of a child under 16 years of age by a parent is constituted a Class A misdemeanor where failure or refusal to support is without lawful excuse. (Penal Law, § 260.05.)

It would thus appear from the general sense of statutory law that our legislators intended to and did impose upon our community the basic obligation of providing an education at public expense for every child, rich or poor, well or ill, normal or handicapped. The indication is equally clear that they intended to impose upon the parent the basic obligation to provide for food, lodging, clothing, and other necessaries for the child, subject, however, to special consideration for blind and deaf children. The question then presents itself as to whether such

special consideration for blind and deaf children renders the provision as to physically handcapped children unconstitutional because of lack of equal protection of the laws.

In determining the constitutionality of statutes, certain basic principles must be considered. Legislative acts are presumed to be valid and will be found so unless the statute bears no rational relationship to a legitimate legislative purpose. (*United States* v. *Kiffer*, 477 F. 2d 349.) A strong presumption of validity attaches to statutes and the burden of proving invalidity is upon those who challenge their constitutionality to establish this beyond a reasonable doubt. (*Fenster* v. *Leary*, 20 N Y 2d 309; *People* v. *Pagnotta*, 25 N Y 2d 333.) A presumption exists that the Legislature has investigated and found the facts necessary to support the legislation (*I. L. F. Y. Co.* v. *Temporary State Housing Rent Comm.*, 10 N Y 2d 263). Legislative enactments will be struck down only as a last and unavoidable resort. (*Nettleton Co.* v. *Diamond*, 27 N Y 2d 182.) Only a clear violation of the Constitution will justify the court's overruling of legislative will. (*Farrington* v. *Pinckney*, 1 N Y 2d 74.)

As to equal protection, it has been held: "Like the life of the law generally, the Fourteenth Amendment was not designed as an exercise in logic. It is ancient learning by now that a classification meets the equal protection test 'if it is practical, and is not reviewable unless palpably arbitrary.' • • • If the classification has 'some reasonable basis,' it cannot be held offensive to the Equal Protection Clause 'because it is not made with mathematical nicety or because in practice it results in some inequality'." (*Snell* v. *Wyman*, 281 F. Supp. 853, 865, affd. 393 U. S. 323.)

As heretofore stated, historically the Legislature of New York State has extended special and unique consideration for the welfare of blind and deaf children and has not, at least yet, extended the same benefits to children fitting the description of "handicapped" within the meaning of the Education Law and Family Court Act. It is not this court's function to override legislative action and to conclude that the legislative recognition of the peculiar gravity of the hardships of blind and deaf children and their parents is unwarranted or irrational. The Legislature has determined that a blind or deaf child is possessed of handicaps that warrant full contribution by the State for tuition *and* maintenance but has not yet found that a physically or mentally handicapped child requires such full contribution, if his parent is able to provide for the child's maintenance. To hold that the largess provided for a deaf or blind child must be

provided for an otherwise handicapped child would constitute this court as a reviewing agency of the exercise of legislative wisdom by the elected representatives of the voters of the State. As argued by the Attorney-General the grant of public funds for maintenance of blind and deaf children is an act of public charity. It is not for this court to say that the State coffers abound with sufficient funds to extend this solicitude to all handicapped children. Moreover, even if the court found that there is a denial of equal protection as alleged by petitioner, it might be more appropriate to declare the statutes relating to blind and deaf children to be unconstitutional in granting a benefit to such children while denying it to children otherwise handicapped. Such a result would be of no avail to petitioner.

The court finds no basis for the conclusion that the provisions of the Family Court Act and the Education Law are violative of the equal protection provisions of the United States Constitution.

Since it is found that the failure of the statutes to require maintenance by the public authorities for a handicapped child is not a constitutional defect, it is likewise found that an order made under section 232 of the Family Court Act which does not provide for board and lodging is a " suitable order ". Petitioner's arguments to the contrary are rejected.

The court finds no merit in the remaining arguments and directs the submission of an order on five-day notice to the Corporation Counsel of the City of New York, Attorney-General of the State of New York and the Department of Education of the State of New York, granting the relief sought to the extent that the parent be not required to contribute to cost of tuition and in view of the conceded ability of the parent to provide for the maintenance of the child at the special school, absolving the city and State of liability for the cost of board and lodging.

THE DECISION IN MATTER OF CLAIRE.

Following the submission of briefs herein, research by the court, consideration of the legal problems involved herein and formulation of the above decision, the Appellate Division, First Department, on April 30, 1974 came down with its decision in *Matter of Claire* (44 A D 2d 407). There the precise issue as to constitutionality here dealt with was determined adversely to the petitioner. The Appellate Division rejected petitioner's contention that the constitutional right to equal protection required that the petitioner be not required to contribute to the cost of board and lodging and for substantially the same

reasons above set forth, held that petitioner may not be relieved of the obligation to support the child while receiving special education merely because parents of blind and deaf children are the beneficiaries of legislation which grant them such relief. The court held in *Claire*: " Since there is a rational basis for differentiating between blind and deaf children and children with other type handicaps, no invidious discrimination results (cf. Education Law, arts. 85, 87, 88) ". (*Matter of Claire, supra,* p. 411.)

Claire has also clarified the city's claim that no order may be made by the court for the months of July and August when actual classes are not in session. Pursuant to *Claire*, the order to be submitted shall cover tuition and transportation costs for such months.

APPENDIX C

Order of the Family Court, New York County

Form HC-4 (Handicapped)

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK
COUNTY OF NEW YORK

Docket No. H 1921-74

In the Matter of

CLAUDIA MANN

A Handicapped Child

ORDER OF DISPOSITION
(Education of a Handicapped Child)

The petition of HERBERT MANN, sworn to on April 19, 1974, alleging that the above mentioned child is under the age of twenty-one (21) years and is a handicapped and physically handicapped child, in need of special residential educational services, having been filed in this Court, together with: (1) the certification by Helen M. Feulner, Acting Assistant Superintendent of the Board of Education of the City of New York, that the City of New York does not have a suitable educational facility for this child; (2) the form HC-3, (Recommendation to the Family Court by School Superintendent; Physician and Psychologist for Education of a Handicapped Child), containing the certificate of Jon M. Block, M.D., Physician and Irma B. Cobb,

Psychologist, as well as an itemization of the costs of said special education; and (3) the letter of William H. Staples, of the Division for Handicapped Children, State Education Department, dated February 13, 1974, approving State aid for said child; and

The matter having duly come on for a hearing before this Court; and there being no issue as to the facts; and it having been stipulated that the parent is financially able to pay said child's maintenance at the appropriate school; and the Petitioner having challenged the constitutionality of Family Court Act §§ 232 (a) (1), 234, contending that any requirements for parental contribution to the cost of the child's educational services is unconstitutional and a violation of his and his child's rights to the equal protection of the laws under the United States Constitution and the New York State Constitution; and

Said child having been represented by counsel; and the City of New York having been represented by the Corporation Counsel; and the Commissioner of Education and the Attorney General of the State of New York, each having been served and having failed to appear; and

The Court having heard argument in relation to the constitutional issue; it is hereby

ADJUDGED that

1. Claudia Mann is a handicapped child within the meaning of Family Court Act §§ 232 (a) (1), 234, and in need of special residential educational training.

2. The City of New York does not have a suitable educational facility for said child.

3. The Green Chimneys School, Brewster, New York, is an appropriate school.

4. The cost of the child's educational services, including tuition, transportation and maintenance, for the period July 1, 1973 to June 30, 1974 is Seven Thousand Nine Hundred Fifty ($7,950.00) Dollars.

5. There is no constitutional infirmity in Family Court Act §§ 232 (a) (1), 234. Requiring the Petitioner-Parent to contribute to his child's maintenance at the appropriate school, if he is financially able to do so, does not violate the Constitution of the State of New York, nor does it infringe on the parent's or the child's constitutional right to the equal protection of the laws.

6. Herbert Mann, parent, is financially able to contribute the maintenance portion of his handicapped child's special education to the extent of Three Thousand Six Hundred ($3,600.00) Dollars for the period July 1, 1973 to June 30, 1974. It is therefore

ORDERED that, Claudia Mann be furnished special residential education, including tuition, transportation and maintenance at the Green chimneys School, Brewster, New York, for the period July 1, 1973 to June 30, 1974 as itemized in the form HC-3, a copy of which is attached hereto; and it is further

ORDERED that, Herbert Mann, parent, contribute Three Thousand Six Hundred ($3,600.00) Dollars, the maintenance cost of said handicapped child's special residential educational services; and it is further

ORDERED that, the balance of the cost of said educational services, less the sum of Two Thousand ($2,000.00) Dollars

available under § 4407 of the Education Law of the State of New York, that is, a net amount of Two Thousand Three Hundred Fifty ($2,350.00) Dollars, is hereby made a charge upon the City of New York which shall promptly pay the same to the said school; and it is further

ORDERED that, New York State reimburse the City of New York to the extent of one-half of the aforesaid amount.

Signed at New York, New York this 29 day of November, 1974.

MANUEL G. GUERREIRO
Family Court Judge

This is to certify that this is a true copy of an order made in the matter designated in such copy and shown by the records of the Family Court of the State of New York, within the City of New York, for the County of New York.

WILLIAM J. GREENE
Clerk of Court

Date Nov 29 1974

APPENDIX D

Constitution of the United States

AMENDMENT XIV.*

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of New York State

ARTICLE XI—EDUCATION

§ 1. [Common schools]

The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

Formerly Art. 9, § 1, renumbered Art. 11, § 1, Nov. 8, 1938, eff. Jan. 1, 1939.

APPENDIX E

Family Court Act

§ 232. Educational and medical service

(a) The family court has jurisdiction over physically handicapped children.

(1) Educational service. In the case of a physically handicapped child, the court may accept the certificate of the state department of education as to his educational needs, including home teaching, transportation, scholarships, tuition or maintenance. If it shall appear to the court that any child within its jurisdiction is mentally retarded, the court may cause such child to be examined as provided in the mental hygiene law and if found to be mentally retarded as therein defined, may commit such child in accordance with the provisions of such law. Whenever a child within the jurisdiction of the court and under the provisions of this act appears to the court to be in need of special educational training, including transportation, tuition or maintenance, and, except for children with retarded mental development, home teaching and scholarships, a suitable order may be made for the education of such child in its home, a hospital, or other suitable institution, and the expenses thereof, when approved by the court and duly audited, shall be a charge upon the county or the proper subdivision thereof wherein the child is domiciled at the time application is made to the court for such order;

§ 234. Educational service in counties within the city of New York

(a) If it shall appear to the court that any child within its jurisdiction is mentally retarded, the court may cause such child to be examined and if such child shall be found to be mentally retarded within the meaning of the mental hygiene law, the court may commit such child in accordance with the provisions of such law. In the case of a child within its jurisdiction, after satisfactory proof of the need thereof the court may make an order for his (i) maintenance, (ii) transportation, (iii) education, (iv) tuition, and, except for children with retarded mental development, (v) home teaching, or (vi) scholarships.

(b) Whenever the court makes an order for any service set forth in this section, the court may after proper hearing issue an order directing the person or persons liable under the law to support such child to pay a part or all of the expense of such service, (a) in the manner provided elsewhere in this act for the support or partial support of a child committed by the court or (b) proceed directly at the time the order for such service is made to inquire into and determine the liability of any such person and may by order require such person to pay part or all of the expense of such service in a lump sum or in such weekly or monthly installments as the court may decide. The procedure specified in (b) shall be followed in the case of any child who is physically handicapped as defined in paragraph one of subdivision a of section 556–18.0 of the administrative code of the city of New York. The court may issue a summons or in proper instances a warrant for the appearance of the person alleged to be liable.

L.1962, c. 686; amended L.1964, c. 253, § 7; L.1973, c. 195, § 20.

New York State Education Law

§ 3205. Attendance of minors upon full time day instruction

1. a. In each school district of the state, each minor from six to sixteen years of age shall attend upon full time instruction.

§ 4203. Persons eligible for appointment as pupils to institutions for instruction of the deaf

All deaf children resident in this state, of the age of three years and upwards and of suitable capacity, and who shall have been resident in this state for one year immediately preceding the application, or, if an orphan, whose nearest friend shall have been resident in this state for one year immediately preceding the application, shall be eligible to appointment as state pupils in one of the institutions for the instruction of the deaf of this state, authorized by law to receive such pupils; provided, however, the foregoing requirement as to length of residence in this state may be waived in the discretion of the commissioner of education.

L.1947, c. 820, eff. July 1, 1947.

§ 4204. Support and term of instruction of deaf state pupils

1. Each deaf pupil so received into any of the institutions aforesaid shall be provided with board, lodging and tuition; and the directors of the institution shall receive an appropriation for each pupil so provided for, in quarterly payments, to be paid by the commissioner of taxation and finance, on the warrant of the comptroller, to the treasurer of said institution; provided, however, that an estimated one-half of each such quarterly payment shall be due on the first day of each quarter, the estimate to be based on the affidavit of the chief executive officer of the institution stating the number of pupils for whom board, lodging and tuition was so provided by the institution during the preceding quarter and during the comparable quarter of the preceding year, and the remaining part of each such quarterly payment shall be due thereafter on the first day of the quarter next ensuing, upon the presentation by the treasurer of the institution of a bill showing the actual time and number of pupils attending the institution, which bill shall be signed by the chief executive officer of the institution, and verified by his oath.

3. Children placed in any such institution for the instruction of the deaf, pursuant to section forty-two hundred three, shall be maintained therein at the expense of the state for the period of time the school is in session.

L.1947, c. 820; amended L.1949, c. 687, § 56; L.1957, c. 243, § 1; L.1958, c. 352, § 1, eff. April 1, 1958.

§ 4206. Persons eligible for appointment as pupils to institutions for instruction of the blind

1. All blind persons of suitable age and capacity and who shall have been residents in this state for one year immediately preceding the application or, if a minor, whose parent or parents, or, if an orphan, whose nearest friend, shall have been a resident in this state for one year immediately preceding the application, shall be eligible for appointment as state pupils to the Institute for the Education of the Blind in the city of New York, the New York State School for the Blind in the city of Batavia or the Lavelle School for the Blind in the city of New York.

2. Blind babies and children of the age of fifteen years and under and possessing the other qualifications prescribed in this article and requiring kindergarten training or other special care and instruction, shall be eligible for appointment as state pupils by the commissioner of education at his discretion in any incorporated institution furnishing approved care, training and instruction for blind babies and children, and any such child may be transferred to the Institute for the Education of the Blind in the city of New York, the New York State School for the Blind in the city of Batavia or the Lavelle School for the Blind in the city of New York, to which he or she would otherwise be eligible for appointment, upon arriving at suitable age, in the discretion of the commissioner of education.

3. All such appointments, with the exception of those to the New York State School for the Blind in the city of Batavia, shall be made by the commissioner of education. The requirement of this section as to length of residence in this state may be waived in the discretion of the commissioner of education.

L.1947, c. 820; amended L.1956, c. 347, eff. July 1, 1956.

§ 4207. Support and term of instruction of blind state pupils

1. Each blind pupil so received into any of the institutions specified in this article shall be provided with board, lodging and tuition; and the directors of the institution shall receive an appropriation for each pupil so provided for, in quarterly payments, to be paid by the commissioner of taxation and finance, on the warrant of the comptroller, to the treasurer of said institution; provided, however, that an estimated one-half of each such quarterly payment shall be due on the first day of each quarter, the estimate to be based on the affidavit of the chief executive officer of the institution stating the number of pupils for whom board, lodging and tuition was so provided by the institution during the preceding quarter and during the comparable quarter of the preceding year, and the remaining part of each such quarterly payment shall be due thereafter on the first day of the quarter next ensuing, upon the presentation by the treasurer of the institution of a bill showing the actual time and number of pupils attending the institution, which bill shall be signed by the chief executive officer of the institution, and verified by his oath.

4. Children placed in any such institutions for the blind pursuant to section forty-two hundred six shall be maintained therein at the expense of the state for the period of time the school is in session.

L.1947, c. 820; amended L.1957, c. 243, § 2; L.1958, c. 352, § 2, eff. April 1, 1958.

§ 4302. Object of institution

The primary object of the school shall be, to furnish to the blind children of the state the best known facilities for acquiring a thorough education, and to train them in some useful profession or manual art, by means of which they may be enabled to contribute to their own support after leaving the school; but it may likewise, through its industrial department, provide such of them with appropriate employment and boarding accommodations as find themselves unable, after completing their course of instruction and training, to procure these elsewhere for themselves. It shall, however, be in no sense an asylum for those who are helpless from age, infirmity or otherwise, or a hospital for the treatment of blindness.

L.1947, c. 820, eff. July 1, 1947.

§ 4308. Requisites for admission

All blind persons of suitable age and capacity for instruction, who are legal residents of the state, shall be entitled to the privileges of the New York State School for the Blind, without charge, and for such a period of time in each individual case as may be deemed expedient by the education department; provided, that whenever more persons apply for admission at one time than can be properly accommodated in the school, such department shall so apportion the number received, that each county may be represented in the ratio of its blind population to the total blind population of the state.

L.1947, c. 820, eff. July 1, 1947.

§ 4352. Object of institution

The primary object of the school shall be to furnish to children of the state suffering from deafness or a combination of deafness and other handicaps, and who may be expected to profit from instruction, such educational opportunities as will enable them, so far as practical, to become useful and well-adjusted citizens of the state.

Added L.1963, c. 762, § 2, eff. July 1, 1963.

§ 4355. Requisites for admission

All deaf persons of suitable age and the capacity for instruction who are legal residents of the state shall be entitled to admission to the New York state school for the deaf without charge for such period of time in each individual case as shall be deemed proper and expedient by the department, provided, however, that when more persons apply for admission than can be properly accommodated in the school, the department shall apportion the number to be received among the counties of the state according to an equitable plan to be adopted by the department and approved by the regents.

Added L.1963, c. 762, § 2, eff. July 1, 1963.

§ 4402. Duties of education department

The state education department shall have power and it shall be its duty:

2. To stimulate all private and public efforts designed to relieve, care for, cure or educate handicapped children and to coordinate such efforts with the work and function of governmental agencies.

§ 4403. Procedure through family court; cost of educational services

1. The state education department shall have the power and duty to provide within the limits of the appropriations made therefor, home-teaching, transportation, scholarships in non-residence schools, tuition or maintenance and tuition in elementary, secondary, higher, special and technical schools, for handicapped children in whole or in part from funds of the department, when not otherwise provided by parents, guardians, local authorities or by other sources, public or private. When the family court, or the board of education of the city of New York, shall issue an order to provide for the education, including home-teaching, transportation, scholarships, tuition or maintenance, of any handicapped child the commissioner of education, if he approves such order, shall issue a certificate to such effect in duplicate, one of which shall be filed with the clerk of the board of supervisors or other governing elective body of the county or chief fiscal officer of a city and one in the office of the commissioner of education.

2. One-half of the cost of providing home-teaching, transportation, scholarships in non-residence schools, tuition and maintenance, as provided in subdivision one of this section, as certified by the commissioner of education, is hereby made a charge against the county or city in which any such handicapped child resides, and the remaining one-half of the cost thereof shall be paid by the state out of moneys appropriated therefor. All claims for services rendered and for supplies furnished and for other expenses incurred in providing such home-teaching, transportation, scholarships and tuition, shall be paid in the first instance by the board of supervisors or other governing elective body of the county or chief fiscal officer of a city in which such handicapped child resides, upon vouchers presented and audited in the same manner as in the case of other claims against the county or city.

3. The legislature shall appropriate an amount sufficient to pay one-half of all the claims paid by a county or city for the purposes and in the manner herein specified. The clerk of the board of supervisors or other governing elective body of each county or chief fiscal officer of a city of the state which has paid claims as provided herein shall, not oftener than once in each month, transmit to the commissioner of education a certified statement in the form prescribed by him, stating the amount expended for the purposes specified herein, the date of each expenditure, and the purpose for which it was made. Upon the receipt of such certified statement the commissioner of education shall examine the same, and if such expenditures were made as required by law he shall approve it and transmit it to the comptroller for audit. The comptroller shall thereupon issue his warrant in the amount specified in such approved statement for the payment thereof out of moneys appropriated therefor to the county treasurer of the county or chief fiscal officer of a city by which such payments were made.

Added L.1956, c. 722, § 6, amended L.1962, c. 690, § 6; L.1962, c. 691, § 1; L.1967, c. 786, § 3, eff. July 1, 1967.

§ 4404. Duties of school districts

b. Provided, however, that in each city or union free school district in which schools for handicapped children exist or may hereafter be established, which are incorporated under the laws of the state and are found by the board of education to be adequate to provide instruction adapted to the mental attainments and physical conditions of such children, the board of education shall not be required to supply additional special classes for the children so provided for. The boards of education of such cities or union free school districts are hereby authorized and empowered to contract with such schools for the education of such children therein.

Such city or union free school districts are also authorized and empowered to contract with private schools outside of such districts but located within the state for the education of such children, provided that such schools must be incorporated in the state of New York and must be registered by the commissioner in accordance with standards established by him.

§ 4407. Special provisions relating to instruction of certain handicapped children

1. When it shall appear to the satisfaction of the department that a handicapped child, who, in the judgment of the department can reasonably be expected to benefit from instruction, is not receiving such instruction because there are no adequate public facilities for instruction of such a child within this state because of the unusual type of the handicap or combination of handicaps, the department is authorized to contract with an educational facility located within or without the state, which, in the judgment of the department, can meet the needs of such child, for instruction of such child in such educational facility, and the department is further authorized to expend for such purpose a sum of not to exceed two thousand five hundred dollars per annum for each such pupil.,

APPENDIX F

Notice of Appeal to the Supreme Court of the United States

~~COURT OF APPEALS~~
~~STATE OF NEW YORK~~

~~Court of Appeals Docket~~ Numbers
~~21, 22, 23, 24-1976~~

Family Court, Queens County Docket Nos.
H 2373-73, H 1674-74 FILED 4/30/76

Family Court, New York County, Docket Nos.
H 1919-74, H 1921-74 FILED 4/29/76

In the Matter of

BRUCE MICHAEL LEVY, a Handicapped Child.

JOSEPH W. LEVY,

Petitioner-Appellant,

—against—

CITY OF NEW YORK, *et al.*,

Respondents-Respondents.

And 3 additional proceedings:

MATTER OF BRUCE MICHAEL LEVY,
MATTER OF CLAUDIA MANN,
MATTER OF BRUCE A. VANDER MALLE.

SIRS:

NOTICE IS HEREBY GIVEN that the Petitioners-Appellants, JOSEPH W. LEVY, HERBERT MANN and HAROLD A. VANDER MALLE hereby appeal to the Supreme Court of the United States from the Final Decision of the State of New York Court of Appeals entered on February 17, 1976 affirming two Orders of the Family Court of the State of New York, City of New York, County of Queens, entered December 3, 1974 under Docket Numbers H 2373-73 and H 1674-74 and two Orders of the Family Court of the State of New York, City and County of New York, entered November 29, 1974 under Docket Numbers H 1919-74 and H 1921-74 adjudging that §§232(a)(1), 234 of the Family Court Act of the State of New York are not repugnant to the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States and requiring the Petitioners-Appellants to pay all or part of the maintenance component of their handicapped children's educational expenses.

This Appeal is taken pursuant to 28 U.S.C. §1257(2).

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